BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Forbearance Under	)	WC Docket No. 05-170
47 U.S.C § 160(c) from Application of	)	
Unbundling Rules that Limit Competitive	)	
Alternatives	)	

REPLY TO OPPOSITIONS TO PETITION FOR FORBEARANCE

XO Communications, Inc.
Birch Telecom, Inc.
BridgeCom International, Inc.
Broadview Networks
Eschelon Telecom, Inc.
NuVox Communications, Inc.
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Date: October 12, 2005

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XO Communications, Inc., Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC and Xspedius Communications (collectively, "Joint Petitioners"), by their attorneys, respectfully reply to the Oppositions filed on September 12, 2005 with the Federal Communications Commission ("FCC" or "Commission") by BellSouth Corporation ("BellSouth"),[1] SBC Communications, Inc. ("SBC"),[2] the Verizon telephone companies ("Verizon"),[3] Qwest Communications International, Inc. ("Qwest"),[4] and the United States Telecom Association

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1 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Comments of BellSouth Corporation, filed Sep. 12, 2005 ("BellSouth Opposition").

2 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Opposition of SBC Communications, Inc., filed Sep. 12, 2005 ("SBC Opposition").

3 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Opposition of Verizon to Petition for Forbearance, filed Sep. 12, 2005 ("Verizon Opposition").

4 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Opposition of Qwest Communications International, Inc., filed Sep. 12, 2005 ("Qwest Opposition").

("USTelecom")[5] (collectively, "RBOCs") in response to Joint Petitioners' Petition for Forbearance.[6] In support of the instant Reply, Joint Petitioners show as follows:

I. INTRODUCTION & SUMMARY

In their Petition for Forbearance, Joint Petitioners urged the Commission to forbear from applying (1) the wire center-based test for DS1 loop impairment to "predominantly residential" and "small office" buildings; (2) the DS1 dedicated transport cap to the use of DS1/DS1 EELs; and (3) eligibility criteria to the use of Enhanced Extended Links ("EELs"). Joint Petitioners argued *inter alia* that these limitations, which were reaffirmed in the *Order on Remand* ("*Triennial Review Remand Order*" or "*TRRO*"),[7] undermine competition by limiting competitive alternatives in instances where facilities deployment is not likely.

In their Opposition filings, the RBOCs argue *inter alia* that the Petition fails to satisfy the statutory requirements under Section 10 of the Communications Act of 1934, as amended ("the Act"), and that Joint Petitioners' request for forbearance is procedurally defective because it "would turn Section 10 on its head" by imposing regulatory burdens rather than removing them.[8]

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5 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Comments of the United Telecom Association, filed Sep. 12, 2005 ("USTelecom Opposition").

6 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Petition for Forbearance of XO Communications et al., filed March 28, 2005 ("Petition for Forbearance" or "Petition").

7 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("*TRRO*").

8 *See, e.g.*, SBC Opposition at 7.

Apparently, the RBOCs believe that only ***they*** are entitled to forbearance. By its plain terms, however, Section 10 of the Act requires the Commission to forbear from "***any*** regulation or provision of [the] Act…" upon satisfaction of the three-prong test set out by Congress.[9] Thus, the Commission has a duty to remove not only regulations that unduly restrict the RBOCs, but it must also forbear from regulations that stifle competitive local exchange carriers ("CLECs"). Despite RBOC protestations to the contrary, forbearance is procedurally appropriate here, where the regulations at issue are ***limitations on separate, affirmative obligations*** or CLEC rights of access. The Commission has the authority necessary to remove such limitations and has done so in the past. Indeed, to the extent that the Commission needs to articulate new rules to guide a grant of forbearance, Commission precedent clearly indicates that it has the authority to do so. Therefore, forbearance is procedurally appropriate in the instant matter. Furthermore, as stated in the Petition, Joint Petitioners have satisfied the three-part test for forbearance under Section 10 of the Act. Forbearance from the unbundling limitations described in the Petition will promote competition by removing regulations that unnecessarily limit the opportunity for CLECs to offer telecommunications services in competition with ILECs, and will thereby protect consumers. Accordingly, the Commission must grant Joint Petitioners' request for forbearance.

II. FORBEARANCE IS PROCEDURALLY APPROPRIATE

The RBOCs' procedural objections should be dismissed out of hand. Forbearance is not the sole domain of the RBOCs. It can and should be used when Commission rules impede CLECs from offering competitive alternatives to the RBOCs' services. Here, three rules present

[9] 47 C.F.R. §160.

such obstacles. By removing the rule, the Commission would allow application of a separate, affirmative unbundling obligation to the situation presented.

Respecting the DS1 transport cap and the EEL eligibility criteria, the RBOCs do not seriously contend that forbearance is procedurally improper, nor could they, as there can be little doubt that those rules very clearly are limitations on separate, affirmative obligations or CLEC rights of access. Indeed, the RBOCs make no attempt to show that forbearance is procedurally improper in those instances. Instead, the RBOCs' arguments regarding the procedural impropriety of forbearance appear to be directed solely at Joint Petitioners' request to forbear from applying the Commission's DS1 loop impairment test. The RBOCs arguments must fail, however, as the DS1 loop impairment test is also a limitation on a separate, affirmative obligation.

A. DS1 Transport Cap

There can be little doubt that the DS1 transport cap is a limitation on the transport unbundling obligation. In the *TRRO*, the Commission clearly held that "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of transport circuits that each carrier may obtain on that route to 10 circuits."[10] Further, Rule 51.319(e)(2)(ii)(B) provides that "[a] requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 dedicated transport is available on an unbundled basis."[11] The DS1 transport cap is a limitation on a separate, affirmative obligation to unbundle DS1 transport. Indeed, paragraph 128 is even entitled, "Limitation on DS1 Transport." The Commission has the

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10 *TRRO* at ¶128.

11 47 C.F.R. §51.319(e)(2)(ii)(B).

authority to forbear from applying this limitation. Furthermore, because forbearance from the DS1 transport cap would merely remove a limitation on a pre-existing obligation, the Commission would not be required to create any additional rules.

B. EEL Eligibility Criteria

As with the DS1 transport cap, the RBOCs do not seriously contend that forbearance is procedurally improper for the EEL eligibility criteria. The EEL eligibility criteria are limitations on a pre-existing right of access. In the *TRO*, the Commission recounted the history of the EELs restrictions, noting that "[i]n the *Local Competition Order* and *UNE Remand Order*, the Commission determined not to impose eligibility thresholds for UNE access."[12] As the Commission further explained, it was not until the *Supplemental Order* that the Commission first restricted the use of EELs. Thus, it should be clear that the eligibility criteria are limitations on pre-existing rights of access and, therefore, forbearing from applying the criteria would not leave "a vacuum," as SBC has claimed. Rather, granting forbearance from the overly restrictive EELs criteria would leave carriers governed by the rules established in the *Local Competition Order* and *UNE Remand Order*, subject only to the limitations established in the *TRRO*, *i.e.*, the prohibition on the use of EELs to provide exclusively long distance services or mobile services. Further, as Joint Petitioners have explained in their Petition, the EEL eligibility criteria are superfluous now that the Commission in the *TRRO* has directly prohibited long distance service carriers' and mobile service providers' use of EELs. In the absence of Commission action to repeal a rule or regulation, forbearance is a procedurally valid tool to eliminate redundant,

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12 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003) ("*Triennial Review Order*") ("*TRO*") at ¶590.

superfluous or otherwise unnecessary regulation which is not in the public interest. Furthermore, because forbearance from the EEL eligibility criteria would simply remove limitations on a pre-existing right of access, the Commission would not be required to create any additional rules.

C. DS1 Loop Impairment Test

In the *TRRO*, the Commission made two findings with respect to DS1 loops. First, the Commission found that requesting carriers are impaired for DS1 loops, generally. Second, the Commission found an ***exception*** to that general rule, holding that that requesting carriers are not impaired and thus are not entitled to unbundled access to DS1 loops in wire centers with more than (a) 60,000 business lines and (b) four fiber-based collocators.[13] Thus, the Commission's limitation on access is the wire center test.

The Commission selected "the area served by a wire center" as the appropriate geographic market to assess whether requesting carriers are impaired without access to ILECs' unbundled network elements ("UNEs").[14] In arriving at its decision, the Commission rejected an array of options offered by commenters, including several building-specific tests, finding that such tests raised administrability concerns, especially in light of the D.C. Circuit's prohibition on subdelegation in *USTA II*.[15] Further, the Commission stated that a wire center-based test was compelled by the D.C. Circuit's directive that it consider both actual and potential competition.[16]

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13 *See TRRO* at ¶ 5 ("competitive LECs ***are impaired*** without access DS-1 capacity loops ***except*** in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators") (emphasis added).

14 *Id.* at ¶155.

15 *Id., citing United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

16 *Id.*

In their Petition for Forbearance, Joint Petitioners showed *inter alia* that the Commission's wire center-based test for DS1 loop impairment creates a substantial risk of false findings of non-impairment given the undisputed evidence submitted in the *Triennial Review Remand* proceeding which shows that CLECs cannot economically deploy loops to a building unless the customer demand is equivalent to at least three DS3's worth of traffic.[17] Accordingly, Joint Petitioners requested that the Commission forbear from applying its wire center-based impairment test to DS1 loops used to serve "predominantly residential" and "small office" buildings, where demand does not economically justify the deployment of any loop facilities.[18]

In their respective Oppositions, the RBOCs contend that there is no affirmative obligation from which to forbear.[19] For instance, Verizon asserts that both the D.C. Circuit (in *USTA II*) and the Supreme Court (in *AT&T v. Iowa Utilities Board*) have held that there is no pre-existing unbundling obligation under the Act.[20] Additionally, SBC claims that granting the Petition by eliminating rules "would leave a vacuum" and would not require ILECs to unbundle the facilities at issue.[21]

The RBOCs misread the TRRO and the Petition. Joint Petitioners do not assert that there is a default unbundling obligation ***under the Act.*** Rather, Petitioners contend that the Commission's rules themselves, as established in the *TRRO*, evince an affirmative obligation to unbundle DS1 loops -- "***except*** in any building within the service area of a wire center containing

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17 Petition for Forbearance at 7.

18 *Id.*

19 *See, e.g.,* SBC Opposition at 6 ("unbundling obligations require an affirmative finding of impairment"); USTelecom Opposition at 2 ("Forbearance only makes sense in the context of affirmative regulatory obligations").

20 Verizon Opposition at 1, 6.

21 SBC Opposition at 8.

60,000 or more business lines and 4 or more fiber-based collocators."[22] Indeed, the Commission held that "competitive LECs ***are impaired*** without access DS-1 capacity loops ***except*** in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators."[23] Elsewhere in the *TRRO* the Commission stated, "we find that requesting carriers ***are impaired*** without access to DS-1 capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 60,000 business lines or fewer than four fiber-based collocators."[24] Moreover, Rule 51.319(a) provides that "….an incumbent LEC ***shall*** provide a requesting telecommunications carrier with nondiscriminatory ***access to a DS1 loop on an unbundled basis*** to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators."[25] Thus, contrary to the RBOCs' claims, the *TRRO* created two obligations: (1) an obligation to unbundled DS1 loops, generally and (2) an exception to or a limitation on this obligation when the DS1 wire center test is met. Joint Petitioners ask the Commission to forbear from the latter obligation in certain instances in order to promote the pro-competition goals of the Act. Forbearance from the DS1 wire center test will result in application of the DS1 loop impairment finding to these locations. Forbearance, therefore, does not create new obligations as the RBOCs assert.

Moreover, the Commission has previously granted forbearance from applying limitations such as those at issue here. In the *Core Forbearance Order*, which was issued after the D.C. Circuit's *USTA II* decision, the Commission forbore from applying growth caps and the

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22 *TRRO* at ¶5 (emphasis added).

23 *Id.*

24 *Id.* at ¶146 (emphasis added).

25 47 C.F.R. §51.319(a) (emphasis added).

"new market rule" established in its *ISP Remand Order*.[26] The growth caps and new market rule were clearly limitations on the general rule that carriers are entitled to compensation for termination of ISP-bound traffic. Forbearance from those rules did not "create" a new reciprocal compensation obligation; it merely removed a limitation on the general obligation to provide compensation for ISP-bound traffic. Similarly, the Commission may forbear from applying the limitations on its unbundling rules as described in Joint Petitioners' request for forbearance.

The RBOC also contend that the Commission cannot use its forbearance authority to create new rules, including drafting definitions for "predominantly residential" and "small office" building.[27] The RBOCs' contention is simply erroneous. As explained above, the Commission is not "creating" new rules, but rather is simply removing limitations on its existing rules. The Commission has the discretion to define the scope of its forbearance by using rules to define when forbearance applies. Indeed, the Commission would no more be acting to "create" rules here than it did in the *Core Forbearance Order*.

Even *assuming arguendo* that granting the instant Petition of Forbearance would require the Commission to "create rules" by establishing new definitions for "predominantly residential"[28] or "small office" buildings, the Commission's *TracFone Order* makes clear that

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26 *Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. §160(c) from Application of the ISP Remand Order*, Order, WC Docket No. 03-171 (rel. Oct. 18, 2004) ("*Core Forbearance Order*").

27 *See, e.g.*, BellSouth Opposition at 5-6 ("These issues are properly the subject of a rulemaking, not a forbearance petition"); SBC Opposition at 6 ("Forbearance is an eraser not a pencil….the Commission does not have carte blanche to use its forbearance authority to create new rules and obligations"); Qwest Opposition at 3 ("Section 10 does not confer authority on the Commission to create new rules").

28 The Commission does not need to create a new definition for "predominantly residential" buildings. The Commission could simply define these buildings in the same was as it did in the *BellSouth MDU Order*. *See, In the Matter of Review of the Section 251*

. . .Continued

the Commission may facilitate a grant of forbearance through additional regulation. Indeed, the U.S. Court of Appeals for the District of Columbia Circuit has held that the Commission has the leeway to determine which regulatory tools will be most effective in advancing the Congressional objective.[29]

In the *TracFone Forbearance Order*, the Commission *conditionally* granted TracFone's request to forbear from enforcing Section 214(e) of the Act, which effectively bars companies that do not own their own facilities from participating in the Commission's Lifeline low-income universal service support program.[30] Specifically, the Commission conditioned its grant of forbearance on "TracFone attaining Eligible Telecommunications Carrier designation, providing Lifeline customer services that include basic and enhanced 911 capabilities regardless of whether the handset is activated, providing Lifeline customers E911 compliant handsets only, obtaining certification from Public Safety Answering Points of its compliance with basic and enhanced 911 obligations in the areas in which it operates, and adopting sufficient safeguards to ensure the integrity of the Lifeline program."[31] Simply put, these "conditions" are nothing more than "rules" which facilitate forbearance from Section 214 of the Act and with which TracFone must comply.

Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, FCC 04-191, Order on Reconsideration (rel. Aug. 9, 2004) ("*BellSouth MDU Order*").

29 *See Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198, 212 (D.C. Cir. 1982) *citing, Philadelphia Television Broadcasting Co. v. FCC,* 359 F.2d 282, 284 (D.C.Cir.1966).

30 *In the Matter of Petition of TracFone Wireless for Forbearance from 47 U.S.C. §214(e)(1)(A) and 47 C.F.R. §54.201(i)*, CC Docket No. 96-45, Order (rel. Sep. 8, 2005) ("*TracFone Forbearance Order*").

31 FCC Public Notice, *FCC Conditionally Grants TracFone's Petition for Forbearance*, rel. Sep. 6, 2005.

III. THE TEST FOR FORBEARANCE IS MET

A. DS1 Loop Impairment Test

Joint Petitioners have satisfied the three-pronged test for forbearance as it relates to the Commission's DS1 loop impairment test. As Joint Petitioners have shown in their forbearance request, the Commission's wire center-based test for Tier I DS1 loop impairment test, as applied to "predominantly residential" and "small office" buildings, impedes competition and thus does nothing to ensure just, reasonable, and nondiscriminatory charges, practices and classifications or to protect consumers from harm.[32] The Commission's wire center-based test is a poor proxy for assessing impairment. The characteristics of the *buildings* to be served by those loops drive loop deployment decisions, not the characteristics of the *wire center*. As such, the use of a wire center-based test is likely to create a number of false findings of non-impairment, since the wire center test applies to *all* buildings within the wire center footprint, regardless of size, demand, building access problems or other features related to loop impairment.[33] Thus, the DS1 loop impairment test unjustly and unreasonably discriminates against CLECs attempting to serve customers at smaller locations, where it is not economically feasible to deploy facilities given the sunk costs and the inherent lack of economies of scale. Granting forbearance in the instant matter will promote competition in the provision of telecommunications services to predominantly residential and small business customers and protect consumers from harm.

In their Oppositions, the RBOCs maintain that the Commission must reject challenges to the Commission's DS1 loop impairment test. Verizon and Qwest argue *inter alia*

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32 Petition for Forbearance at 6-19.

33 *See TRO at* ¶¶302-306 (causes of impairment include customer demand, building access, rights of way/franchise agreements, and delays). *See also*, *TRO* at ¶¶84-91 (scale economies, sunk costs, first mover advantages, absolute cost advantages, and barriers within control of the ILEC are barriers to entry most likely to create impairment).

in opposition to any building-specific approach, proffering that CLECs have built fiber rings which allow to cost effectively serve "nearby" buildings, regardless of whether a particular building is large or small.[34] Further, SBC contends that "where CLECs have deployed hi-cap fiber they can channelize those facilities to offer lower capacity service and thus provide competitive DS1 services."[35] BellSouth also claims that, according to "public information," CLECs have access to at least half a million buildings on their fiber networks.[36]

First, the RBOCs' have vastly overstated the scope of CLECs' facilities deployment. The FCC stated as much in its brief in the *TRRO* appeal before the D.C. Circuit, finding that data relied upon by the ILECs does not speak to the impairment question.[37]

Furthermore, the RBOC arguments ignore the fact that CLECs typically do not have fiber near predominantly residential or small office buildings and cannot economically deploy fiber to or near those locations. To better illustrate the point, for example, Eschelon serves 48 separate locations in the serving area of Qwest's MPLSMNDT wire center (one of the wire centers Qwest claims meet the DS1 loop test) with only a single DS1 UNE loop. Eschelon, however, does not have its own fiber rings. Thus, a DS1 UNE is the only means of reaching such customers. As the Commission itself has already found, given a demand of only a single DS1, it is not economically feasible for Eschelon to build to these locations.[38] Similarly, many

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34 Qwest Opposition at 6; Verizon Opposition at 11.

35 SBC Opposition at 12.

36 BellSouth Opposition at 9.

37 *See, Covad Communications et al. v. FCC*, Case No. 05-1095 (D.C. Cir.), Brief for Respondents at 65-66 ("FCC Brief") (concluding that the data submitted by the ILECs "are not complete, not representative of the entire industry, not readily confirmable, and aggregated at too high a level to be informative of local market conditions").

38 FCC Brief at 69-70 (acknowledging its finding that stand-alone "DS1 loops offer low revenue opportunities and are thus unlikely to be deployed competitively").

of XO's DS1 UNEs in "Tier 1" wire centers serve a location with only one or two DS1s of capacity.[39] For instance, XO uses one or two DS1s to serve 153 different locations in SBC's DLLSTXAD wire center area. In BellSouth's MIAMFLPL wire center area, XO uses one or two DS1s to serve 189 different locations. In Verizon's NYCMNY56 wire center area, XO serves 95 different locations using one or two DS1s. If XO were to build a lateral to each of these locations, the cost would be prohibitive. Assume, for example, that each building was located only one mile from one of XO's splice points on its fiber ring. Using the conservative estimate of $200,000 per mile (again, that figure only includes the cost of the lateral), it would cost in excess of $87 million to build out to all of those locations. As Covad notes in its comments, Covad relies exclusively on ILEC-leased DS1 loops for its business T-1 and VoIP offering for the very reason that it is economically prohibitive to build DS1 loops.[40]

SBC contends that CLEC claims that they have no facilities serving these locations are beside the point, because the non-impairment proxies indicate when a CLEC *could* economically justify deployment of competitive fiber that can be channelized.[41] SBC seizes on exactly why the Commission must revisit its decision – because the Commission's non-impairment proxies are *wrong* in these circumstances. CLECs *cannot* economically deploy fiber to predominantly residential and small office buildings for the very reasons previously stated. These buildings would not support the deployment of a DS3 or higher facility because there is

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39 XO's data is based on UNE bills rendered by the RBOCs.

40 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Comments of Covad Communications Company, filed Sep. 12, 2005 at 3 ("Covad Comments"). Covad also notes that a competitive wholesale market for DS1 loops does not exist. *Id.*

41 SBC Opposition at 13.

insufficient demand from the building. If a CLEC cannot deploy a DS3, it follows that the CLEC also cannot deploy a DS1. Indeed, the FCC's brief in *TRRO* appeal acknowledged that the Commission's finding concerning DS1s was predicated on a finding that DS3s could be deployed.[42] The FCC found that DS1s could *not* be deployed on a stand-alone basis, but rather can only be deployed by channelizing a DS3.[43]

SBC and BellSouth contend that failure to apply the non-impairment criterion for DS1 Tier 1 wire centers would harm consumers by imposing costs without corresponding benefits and thereby undermine competition.[44] That contention is patently and utterly fallacious. If anything, the past nine years have shown that consumers, especially small and medium-sized businesses, have greatly benefited from CLEC services, including the integrated T1 services pioneered by the CLEC industry. In fact, the costs of denying CLECs the ability to access the DS1 capabilities of the ILECs' networks, and thereby effectively eliminating competition, has been estimated at nearly $5 billion annually.[45] Further, as Commissioner Copps aptly noted in his dissenting statement in the *TRRO*, "[s]mall businesses generate between two-thirds and three-quarters of all new jobs… and they produce over half the nation's private sector output. The savings they enjoy from competitive telecommunications services go straight to the bottom line."[46] So, contrary to the RBOCs' self-serving statements, the benefits of unbundling are

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42 FCC Brief at 69-70.

43 *Id.*

44 BellSouth Opposition at 9; SBC Opposition at 14-15.

45 Mark T. Bryant, Ph.D. and Michael D. Pelcovits, Ph.D., Microeconomic Consulting & Research Associates, Inc., *The Economic Impact of the Elimination of DS1 Loops and Transport as Unbundled Network Elements* at 10.

46 Dissenting Statement of Commissioner Michael J. Copps, *TRRO* at 182.

manifest and outweigh any additional cost that the RBOCs may incur as a result of unbundling Tier 1 DS1 loop facilities.

B. DS1 Transport Cap

Joint Petitioners have satisfied the three-pronged test for forbearance as it relates to the Commission's DS1 transport cap. As Joint Petitioners argued in their Petition, there is simply no rational basis for the DS1 transport cap.[47] This is especially true given that DS1 transport is used almost exclusively in connection with an individual customer's DS1/DS1 EEL arrangement. The DS1 transport cap will undermine the use of those combinations, which the Commission has found to be an efficient network arrangement, and is also unnecessary to prevent carriers from abuse. Accordingly, the transport cap is not necessary to protect consumers and is not in the public interest.

The RBOCs attack Joint Petitioners' argument regarding application of the DS1 transport cap to EELs by arguing that it "hinges on the false assumption that CLECs cannot multiplex DS1s into DS3 transport facilities."[48] The RBOCs' attack is nonsensical. Clearly, CLECs have the *ability* to multiplex multiple DS1s onto a DS3 circuit, but do not do so in most instances simply because the purported efficiencies of multiplexing traffic do not necessarily hold true. As Eureka *et al*. note, CLECs most often use DS1 transport circuits when they are dedicated to an individual customer, and therefore, a carrier's ability to recoup the costs of a DS1 EEL depends solely on the revenue from the single customer served by that EEL.[49] These

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47 Petition for Forbearance at 20.

48 BellSouth Opposition at 11. *See also*, Verizon Opposition at 15-16.

49 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Comments of Gillette Global Network, Inc. d/b/a Eureka Networks, McLeod USA, Inc., *. . .Continued*

circuits are not multiplexed, and do not aggregate traffic among multiple users. If a carrier were to substitute a DS3 for multiple DS1 transport links, it would be required to install multiplexing equipment at both ends of the route or purchase multiplexing from the ILEC or another source. In addition, it likely would need to collocate at both ends of the route, an expensive and time consuming endeavor. Thus, it does not necessarily follow that it will be more efficient for a CLEC to substitute a DS3 for multiple DS1s simply because the carrier has a specified number of DS1 circuits. Indeed, as CityNet's rate analysis shows, the "cross-over point" where it would be more cost effective for CityNet to multiplex multiple DS1 transport circuits to a DS3 transport circuit is at 23 DS1s, not at 11 DS1s.[50] And, where it is economical to multiplex the circuit, a CLEC will do so.[51] The transport cap is not needed to ensure such use. A rational CLEC will multiplex DS1 transport in those instances even without the cap.

Furthermore, the Commission's brief cross-over analysis does not account for the costs CLECs incur as a result of the ILECs bloated non-recurring charges ("NRCs"). Almost assuredly, if CLECs attempt to move multiple DS1 transport circuits to a DS3 circuit, the RBOCs will attempt to charge disconnect NRCs on each DS1 arrangement, as well as a related NRC for establishing the DS1 circuit.[52] The Commission's analysis also does not account for all

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Mpower Communications Corp., PacWest Telecomm, Inc., TDS MetroCom, LLC, and USLEC Corp., filed Sep. 12, 2005 at 10 ("Comments of Eureka *et al*.").

50 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Comments of CityNet West Virginia LLC, filed Sep. 12, 2005 at 2 ("CityNet Comments").

51 Comments of Eureka *et al*. at 9 ("There is no practical reason for the cap. CLECs would not order more than 10 DS1s per route if it is inefficient to do so").

52 Although NRCs vary from state to state, NuVox estimates, for example, that converting 15 DS1/ DS1 EELs to a DS1/DS3 arrangement may result in NRCs in the $2,000.00 to $3,000.00 range.

the costs associated with reliance on non-ILEC DS3 transport, which at the very least include deployment of a collocation, ILEC charges for moving loops from a multiplexer to a CLEC collocated multiplexing facility, and the cost of non-ILEC transport. As Eureka *et al*. point out, when CLECs cannot obtain a DS1 transport UNE as part of an EELs, they must seek to get different providers to combine separate loop and transport facilities and are often unable to obtain reasonable and timely cross connects.[53] Customers are unwilling to accept delays and uncertainty with provisioning basic DS1 facilities through two alternative wholesale providers.[54]

BellSouth contends that Petitioners ignore the Commission's impairment standard, which requires that impairment be determined based upon a "reasonably efficient competitor" not a carrier's "particular business strategy."[55] BellSouth implies that removing the transport cap as it applies to EELs would result in some type of arbitrage strategy by CLECs.

BellSouth's claim is absurd. EELs are used by "reasonably efficient competitors." In fact, the Commission has repeatedly found that EELs are ***efficient network arrangements*** which extend the reach of requesting carriers' networks, save collocation space and reduce collocation costs, thereby allowing carriers to serve customers they otherwise may be unable to serve.[56] Furthermore, BellSouth misunderstands the "reasonably efficient competitor" standard. Neither the Act nor the Commission's orders limit CLECs to any particular business strategy. Instead, the Commission has repeatedly emphasized that the Act permits all available

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53 Comments of Eureka *et al.* at 9.

54 *Id.*

55 BellSouth Opposition at 10. It is worth noting that, in the Change-of-Law proceedings currently taking place throughout the BellSouth region, BellSouth has acceded to Joint Petitioners' position that paragraph 128 of the *TRRO* controls the DS1 transport cap, *i.e.*, that the cap only applies when DS3s are not available.

56 *TRO* at ¶576.

business strategies.[57] The fact that some CLECs may deploy different business strategies does not undermine the legitimacy of an EEL strategy. Moreover, BellSouth should not be able to dictate its competitors' business strategies.

Application of the DS1 transport cap to EELs would also conflict with the DS1 loop cap, effectively limiting to ten the number of EELs that a CLEC can connect to a wire center.[58] If a requesting carrier were limited to ten DS1 transport circuits per route, then it would be unable to provision more than ten DS1/DS1 EELs to customers served by any given wire center. This in effect would limit the requesting carrier to ten DS1 loops *in the entire wire center*, rather than ten loops per customer location.

C. EEL Eligibility Criteria

Joint Petitioners have satisfied the three elements of the test for forbearance as applied to the EEL eligibility criteria. As explained in the Petition for Forbearance, the Commission originally justified its EELs restrictions as necessary to protect against the substitution of EELs for long distance special access and to prevent "gaming" by providers of "non-qualifying" services.[59] The *TRRO* addressed these concerns with new rules that prohibit non-impaired uses directly and therefore substantially reduces the universe of special access circuits that might satisfy the eligibility criteria.[60] Moreover, the Commission's impairment determinations themselves even further reduce the instances where UNEs are available,

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57 *TRRO* at ¶25.

58 *In the Matter of Petition for Forbearance under 47 U.S.C. §160(c) from Application of Unbundling Rules that Limit Competitive Alternatives*, WC Docket No. 05-170, Comments of CompTel, filed Sep. 12, 2005 at 7-8 ("CompTel Comments"); Comments of Eureka *et al.* at 10; Petition for Forbearance at 22.

59 Petition for Forbearance at 24.

60 *TRRO* at ¶36.

"protecting" against non-impaired uses of EELs.[61] At the same time, the EEL criteria are overly restrictive, and would limit the availability of a UNE combination even though the CLEC is not using a circuit for a prohibited long distance or wireless use. Forbearance from application of the EEL eligibility criteria is appropriate.

In their Oppositions, the RBOCs assert that the Commission should reject challenges to the EEL eligibility criteria.[62] For instance, Verizon maintains that the current rules do not go far enough to ensure that CLECs do not obtain UNEs to provide exclusively long distance services.[63] Qwest echoes that sentiment, contending that "the risk of unlawful conversions of special access to UNEs in Qwest's region is as acute as ever, as CLECs as seeking to convert thousands of special access circuits to UNEs or combinations of UNEs. Whatever marginal protection the service eligibility criteria provide from regulatory arbitrage between special access and UNEs must be preserved."[64] The RBOC criticisms all miss the mark.

The RBOCs have repeatedly justified the EEL rules by claiming that they are somehow necessary to protect against "gaming" by CLECs. Yet, like Chicken Little, the RBOCs' cries are based on erroneous conclusions from incorrect evidence. The RBOCs do not identify any cognizable risk of, as Qwest put it, "unlawful conversions of special access to UNEs." Nowhere in this proceeding is there evidence that even a single CLEC has converted special access circuits used exclusively for long distance services or used exclusively for wireless services. It has been over five years since the FCC first articulated a CLEC's right to

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61 *Id.*

62 *See, e.g.,* BellSouth Opposition at 12 ("It would hardly be in the public interest to eliminate the EEL eligibility criteria and thereby facilitate unbundled access to facilities to which CLECs are not lawfully entitled").

63 Verizon Opposition at 16-17.

64 Qwest Opposition at 9.

use EELs, yet the RBOCs still do not present any concrete evidence that the risks they predict are real, let alone "acute" as Qwest claims.

For example, BellSouth has harassed NuVox for more than three years by attempting to audit NuVox's compliance with the Commission's eligibility criteria with barely a shred of documentary evidence to support its naked and unfounded allegations. During that time, BellSouth has relied upon false information, has consistently misrepresented both the facts and the law, and in some cases it has completely fabricated tales, all in an effort to paint NuVox as the "poster child" for EELs non-compliance.[65]

The RBOCs also are incorrect in claiming that they do not have a remedy if "unlawful" use of EELs should occur. As CompTel points out, "use of UNEs in violation of the Commission's new rules could justify the filing of a 208 complaint, just as any other violation of the Commission's rules. There is no reason for the Commission to maintain what is, in essence, a self-help process by which the incumbents can unilaterally police UNE orders and impose the costs and burdens of audits on carriers."[66] Indeed, the RBOCs have not explained why the Commission cannot not police its "exclusive use" standard through Section 208 complaints or through standard interconnection agreement dispute resolution procedures.

Even if a legitimate risk once existed, that risk has been substantially reduced. As Eureka *et al*. aptly note, SBC and Verizon propose to acquire the very IXCs they claimed posed

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65 *See In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, Reply to Oppositions on behalf of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc., and Xspedius Communications LLC, filed June 16, 2005, at 9 and Reply Declaration of Riley M. Murphy on behalf of NuVox Communications, Inc., attached thereto.

66 CompTel Comments at 8.

the greatest risk of substituting UNEs for special access.[67] If AT&T and MCI are merged out of existence as competitive providers, the number of legacy special access circuits used exclusively for long distance services would be reduced greatly. Indeed, all of the RBOCs have gained substantial in-region market shares for long distance service, which further reduces any concern regarding evasion of special access in direct proportion to the RBOC's market share.[68]

Most importantly, the existing eligibility criteria are founded on an already outdated view of "local" services. The criteria were developed based on assumptions concerning how CLECs would offer traditional local voice service in competition with the existing RBOC circuit-switched services. With the recent advent of VoIP services, however, the criteria affirmatively harm the public interest by creating a potential roadblock to the deployment of IP-based services using UNEs.[69] The Commission has traditionally treated enhanced service traffic as interstate in nature and subject to its sole jurisdiction.[70] More recently, although the Commission has not yet classified most iterations of VoIP services (or IP-based services generally),[71] the Commission found that interconnected VoIP services, as defined, "are covered by the statutory definitions of 'wire communication' and/or 'radio communication' because they involve 'transmission of [voice] by aid of wire, cable, or other like connection . . .' and/or

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67 Comments of Eureka *et al*. at 11.

68 *Id.*

69 *See* Covad Comments at 5.

70 *See MTS and WATS Market Structure*, Memorandum Op. and Order, 97 FCC2d 682, 715 ¶ 83 (1983) (enhanced service is "jurisdictionally interstate"); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd. 2631, 2631 ¶ 2 (1988) (describing companies that provide enhanced services as "interstate service providers").

71 *See In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004).

'transmission by radio . . .' of voice," and concluded the services, as a result, ***come within the scope of the Commission's subject matter over interstate communications jurisdiction*** granted in section 2(a) of the Act.[72] This conclusion, in turn, creates the potential that ILECs will claim VoIP services cannot satisfy the EEL criterion that a "local" service be provided over every DS1 circuit.[73] Similarly, some interstate VoIP services may use non-PSTN addressing instead of traditional telephone numbers, and therefore would not satisfy the requirement that at least one local telephone number be assigned to each circuit.[74] Also, the required 24-to-1 ratio of DS1 EELs-to-interconnection trunks clearly was based on a traditional circuit-switched model; this ratio may not hold true for IP-enabled services that CLECs may offer.[75] While it is possible that none of these concerns will be raised by ILECs, the mere possibility that they will be raised inhibits the growth and development of VoIP services offered over UNE facilities.

More broadly, the harm created by the EEL eligibility criteria extends beyond the impact on any individual service. To the extent that the EEL criteria might preclude *any* service that is not exclusively long distance or exclusively wireless, the criteria are harmful to the public interest. Critically, under the FCC's impairment determinations, requesting carriers are impaired in the provision of any service other than stand-alone long distance service and exclusively wireless service. Thus, requesting carriers are entitled to UNEs -- combinations of UNEs -- to provide such other services. Unless the EEL criteria could be defined in such a way that they perfectly proscribed only exclusive long distance/exclusive wireless services -- and no others --

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72 *In the Matters of IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, WC Docket Nos. 04-36 and 05-196 (rel. June 3, 2005) at ¶ 24 ("VoIP E911 Order") (emphasis added).

73 *See TRO* at ¶597.

74 *Id.*

75 *Id.*

the EEL criteria act to restrict use of UNEs in circumstances where competitors are impaired. Joint Petitioners submit that it is impossible to craft EEL criteria that would meet this standard, and consequently, any EEL eligibility rule would necessarily restrict more than the services for which the Commission found non-impairment. Forbearance from application of the eligibility criteria would correct this error and would promote the use of UNEs where CLECs are impaired.

IV. CONCLUSION

In light of the foregoing, Joint Petitioners request that the Commission forbear from enforcing those rules and policies adopted in the *TRRO* and provided for in their Petition for Forbearance.

Respectfully submitted,

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